MOTION FILED
SEP 28 1970
LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 741

CHASE BRASS AND COPPER CO., INCORPORATED, *Appellant*,

v.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, *Appellee*.

On Appeal From the Court of Appeal of California, First Appellate District

MOTION FOR LEAVE TO FILE AND BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA AND THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AS AMICI CURIAE IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA

LAMBERT H. MILLER
General Counsel
1133 Fifteenth Street, N. W.
Washington, D. C. 20005

COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE

GEORGE S. KOCH
Counsel
1028 Connecticut Avenue, N. W.
Washington, D. C. 20036

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 741

CHASE BRASS AND COPPER CO., INCORPORATED, *Appellant*,

v.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, *Appellee*.

On Appeal From the Court of Appeal of California, First Appellate District

---

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

The Committee on State Taxation of the Council of State Chambers of Commerce and the National Association of Manufacturers hereby respectfully move for leave to file the attached brief *amici curiae* in this

case. The consent of the Attorney for the Appellant has been obtained. The consent of the Attorney for the Appellee was requested but refused.

The Council of State Chambers of Commerce (COUNCIL) organized in 1932, consists of 31 Chambers of Commerce (composed of 27 state and 4 Regional Chambers). Its function is to provide advice to the member chambers on important national and state issues affecting the general conduct of business and to represent its membership in appropriate situations. The COUNCIL's Committee on State Taxation (COST), one of the COUNCIL's four advisory committees, consists mainly of multi-corporate enterprises which conduct a substantial portion of the multistate and interstate business in the United States. One of COST's principal activities has been to work toward developing fair and equitable national standards in the income allocation and apportionment aspects of state taxation.

The National Association of Manufacturers (NAM) is a non-profit voluntary business organization organized as a membership corporation under the laws of the State of New York. It is composed of approximately 14,000 manufacturing and related concerns located throughout the United States and represents a substantial proportion of the nation's industrial employment. The majority of these concerns engage in interstate commerce to some degree.

Member companies of COST and NAM, therefore, are representative of that part of the nation's business sector which is most directly affected by state taxation, including corporate franchise taxes, upon multistate and interstate business operations. COST and

NAM are obviously and vitally interested in cases such as this one which present issues significantly affecting the uniformity, certainty and fair apportionment of taxes in each of the fifty states.

The particular interest of COST and NAM in this case is that it presents the fundamental and far-reaching issue of the extent of a state's power under the Due Process and Commerce clauses to tax corporations operating within that State upon the basis of income earned outside of the state by independently operated out-of-state affiliates.

This Court's review of this case and its establishment of constitutional standards for state taxation of multistate businesses are urgently needed for the orderly growth of interstate commerce in the United States. They are also needed to provide a reasonably consistent and fair system of taxation throughout the nation which will allow each state to receive its just share of the total tax contribution of the nation's business sector. Finally, such review is needed to protect the constitutional rights of taxpayers in this era of rapidly increasing state and local revenue needs and the states' tendency toward delegation of the taxing authority among numerous local government units.

By this motion COST and NAM seek leave (1) to show that the decision of the Court of Appeal of California in this case is directly repugnant to long standing judicial interpretation of the Due Process and Commerce clauses of the Constitution and (2) to show the wide and adverse effect upon multistate business operations that decision will have, unless this Court undertakes to resolve the conflict presented.

We, therefore, urge that leave be granted to file a brief as *amici curiae* and respectfully so move the Court.

Respectfully submitted,

Laurence H. Mirer
General Counsel
1133 Fifteenth Street, N. W.
Washington, D. C. 20005

Gerson S. Koen
Counsel
1028 Connecticut Avenue, N. W.
Washington, D. C. 20036

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 741

CHASE BRASS AND COPPER CO., INCORPORATED, *Appellant*,

v.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, *Appellee*.

On Appeal From the Court of Appeal of California, First Appellate District

BRIEF OF THE COMMITTEE ON STATE TAXATION OF THE COUNCIL OF STATE CHAMBERS OF COMMERCE AND THE NATIONAL ASSOCIATION OF MANUFACTURERS, AS AMICI CURIAE IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the Court of Appeal of California, First Appellate District, is reported at 7 Cal. App. 3d 99, 86 Cal. Rptr. 350 (1970); and its opinion on denial of petition for rehearing is reported at 10 Cal. App. 3d 496, 87 Cal. Rptr. 239 (1970).

INTEREST OF AMICI CURIAE

The interest of the Committee on State Taxation (COST) of the Council of State Chambers of Commerce and the National Association of Manufacturers (NAM) is set forth in the accompanying Motion for Leave to File Brief *Amici Curiae*.

ARGUMENT

The crux of the decision of the Court of Appeal of California in this case is that it imposes a franchise tax upon Chase Brass and Copper Co. (CHASE) measured by income earned by independent corporate affiliates of Chase which income is in no way attributable to business operations within the State of California. It is a tax based, therefore, upon wholly extra territorial considerations which the Court traditionally has regarded as an undue burden upon interstate commerce under the Commerce clause and a violation of the "nexus" and "minimum connection" requirements of the Due Process clause.

The constitutional test established by the court requires that a state tax on interstate enterprise may not be sustained where the tax reaches activities carried on beyond the borders of the state. Where a state income tax reaches profits which are in no sense attributable to transactions within its jurisdiction, the Court has held the tax to be constitutionally invalid. *Hans Rees Sons, Inc. v. North Carolina*, 283 U.S. 123 (1931).

California's application in this case of the "combined reporting" or "unitary" approach in the taxation of multicorporate enterprises violates this fundamental standard. As more fully described in the Jurisdictional Statement of Appellant, it includes with-

in the basis for determining the amount of Chase's franchise tax liability the income earned by Kennecott Copper Corporation (KENNECOTT), Kennecott Wire and Cable Co. and Kennecott Sales Corporation on the sole ground that Kennecott owns controlling stock interest in Chase and the other Kennecott companies. The California Court disregards the facts that (1) neither Kennecott nor its subsidiaries, other than Chase, do any business in California, (2) Chase is operated independently from Kennecott and its affiliates and (3) all dealings between Chase and Kennecott are conducted at arms' length and all purchases by Chase of Kennecott products are at standard and well established market prices. In other words, this is a case where the evidence, coupled with the application of standard and generally accepted accounting principles, conclusively demonstrates that the income of Chase's independent affiliates is not in any way attributable to operations within the State of California. By disregarding these facts in imposing the tax in this case, California is attempting to tax extraterritorial operations in violation of established constitutional standards.

This issue is of national importance since it potentially affects every state and every enterprise conducting interstate or multistate operations. As noted by Congressman Rodino in his June 11, 1969, statement before the Committee on Rules of the U. S. House of Representatives:

> "The number of jurisdictions taxing [the several hundred thousand companies engaged in interstate commerce] is staggering. There are in effect at the state level 42 sets of corporate income tax laws, 43 sales and use tax laws, 37 capital stock laws and 8 gross receipts tax laws of general ap-

> plicability. In addition, to compound further the chaos and confusion, business taxes are rapidly proliferating on a local level—with sales taxes already imposed by about 3,000 localities, gross receipt taxes by over 1,000 and corporate income taxes by more than 200 local governments."

The potential effect of the Chase case extends to all of the state and local government taxing jurisdictions employing taxes measured by income, and, of course, to any new state or local tax levies of this type.

The full extent of the burden upon national commerce imposed by the decision in this case is substantially compounded by the often discriminatory taxation of multistate enterprises. This is indicated by the fact that while California in this case has treated a multicorporate enterprise on a unitary basis to increase the taxpayer's tax obligation, other states have refused to balance the scales by applying that doctrine to the same taxpayer where it would result in a corresponding reduction in the tax obligation. See *Kennecott Copper Co.* v. *State Tax Comm.* 118 Utah 140, 221 P. 2d 857 (1950), *Kennecott Copper Corp.* v. *State Tax Comm.*, 5 Utah 2d, 306, 301 P. 2d 562 (1956).

The problem was specifically noted by the Report of the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary of the U. S. House of Representatives. That committee noted that "the present 'unitary business' rules provide vague and sometimes unevenly administered standards for determining when the income of a multicorporate enterprise should be treated as a whole." H. Rep. No. 952, Vol. 4, p. 1155, 89th Cong. 1st Sess. (1965). The Report goes on to state that the establishment of a national standard in this area "will result in a significant measure of relief from the multi-

plicity and diversity of the present system." *Id.* at 1205-06.

Finally, in its study of this problem the House's special subcommittee implicitly anticipated the need for this Court's ultimate resolution of the many conflicts and uncertainties in this area when it stated:

> "First of all, the [unitary business or combined report] concept raises questions in respect to the power of a State to require that an out-of-State corporation's income must be included in the measure of a tax imposed on a in-State corporation. ***This may arise as a constitutional question*** or in terms of the limitations on State taxing power imposed by Public Law 86-272. In the latter case, the question is whether a State may require a company within its taxing jurisdiction to include in the measure of its tax income from an affiliate which is covered by an exemption in that statute. This question is unsettled, and as a result at least one State, California—the leading exponent of the combined report concept—anticipates that it ***will have to litigate the issues involved.***" (Emphasis added.) H. Rep. No. 1480, Vol. 1, p. 245, 88th Cong., 2d. Sess. (1964)

The serious constitutional problems concerning state taxation of multicorporate enterprises can be resolved only by this Court. The courts of the several States are ever more frequently being confronted with cases involving the federal issues raised by this appeal. *Skelly Oil Co.* v. *Commissioner of Taxation*, 269 Minn. 351, 131 N.W. 2d 632 (1964); *Gulf Oil Corp.* v. *Clayton*, 267 N.C. 15, 147 S.E. 2d 522 (1966); *Square D Co.* v. *Bd. of Tax Appeals*, 415 S.W. 2d 594 (Ky. 1967); *F. W. Woolworth Co.* v. *Director*, 45 N.J. 466, 213 A. 2d 1. The result has been a widening disagreement over the constitutional restraints on the States' power to tax multistate business enterprises and an ever-increasing diversity of patterns of state taxation where uniformity

is needed to prevent over or under taxation of multistate business. The result of this conflict and lack of uniformity is uncertainty as to the rights of interstate and multistate business which will impede the orderly growth of national commerce and promote an unfair apportionment of revenue among the States. The magnitude of these problems inevitably increases as state revenue needs grow and the number of taxing authorities are increased by delegation of state taxing authority to local governments and as the states must increasingly look to interstate and multistate business to meet their tax needs.

CONCLUSION

Amici Curiae submit that the Chase case reflects an arbitrary assumption of state taxing authority which violates established constitutional limitations. The case affords the basis for a needed review by this Court of the right of a state or local government to base a tax upon income derived outside its borders through the application of presumptions in the face of facts to the contrary. Such a review is of high interest to the proper economic development of the United States and to business done within it.

Respectfully submitted,

LAMBERT H. MILLER
General Counsel

Attorney for the National Association of Manufacturers of the United States of America

GEORGE S. KOCH
Counsel

Attorney for the Committee on State Taxation of the Council of State Chambers of Commerce

September, 1970